Phillimore, William Phillimore Watt

Heralds' College and coats-of-arms. Ed.3.

Heralds' College

and

Coats-of-Arms,

Regarded from a Legal Aspect.

THIRD EDITION: REVISED.

With a Postscript concerning Prescription,

AND

An Appendix of Statutes and Cases.

BY

W. P. W. PHILLIMORE, M.A., B.C.L.

LONDON: PHILLIMORE & CO., 124, CHANCERY LANE.
1904.

Price One Shilling net, by post 1/1.

Heralds' College
and
Coats-of-Arms,

REGARDED FROM A LEGAL ASPECT.

THIRD EDITION: REVISED.

WITH A POSTSCRIPT CONCERNING PRESCRIPTION, AND AN APPENDIX OF STATUTES AND CASES.

BY

W. P. W. PHILLIMORE, M.A., B.C.L.

LONDON: PHILLIMORE & Co., 124, CHANCERY LANE.
1904.

First Edition ... ... January 1903
Second „ ... ... March „
Third „ ... ... July 1904

NOTE.

The interest taken in the legal aspect of Heraldry and the use of Coats-of-Arms, here presented as concisely as possible, necessitated a second edition within three months of the publication of the first. The opportunity has therefore been taken to carefully revise the pamphlet throughout.

It has been thought expedient in this third edition to deal fully with the subject of Prescription, of late so persistently put forward as a justification for the use of bogus Coats-of-Arms, and to add an Appendix of statutes and modern cases.

HERALDS' COLLEGE

AND

COATS-OF-ARMS.

REGARDED FROM A LEGAL ASPECT.

IF we may judge from the voluminous correspondence, often very acrimonious, concerning coats-of-arms and the right to bear them, which from time to time appears in the newspapers, it is evident that the science of heraldry, effete and obsolete though some may think it, still, in certain ranks of life, excites no little interest. Such correspondence may be mostly classed under two heads; letters from genuinely armigerous persons who feel aggrieved at the number of bogus coats-of-arms which are in existence, and letters from the users of such bogus coats, which generally resolve themselves into attacks upon the officers of arms and Heralds' College, too often it is to be feared originating merely in some petty personal grievance.

It may be worth while, therefore, to consider the origin of coat-armour, and the right to bear it in relation to the officers and College of Arms.

Armorial bearings, or coats-of-arms, in their origin are clearly of a military character, but for many centuries past they have been distinctly a civilian honour. Great uncertainty attaches to the early beginnings of heraldry; it cannot be regarded even as a settled point

whether arms could be assumed by soldiers in the King's army without any specific authorization, or whether the King's own approval, exercised directly, or through his officers of arms, was requisite. Certain it is, however, that the regulation of such matters was very early taken to be a matter of honour, and therefore to be dealt with by the royal prerogative, as the well-known case of Scrope *v.* Grosvenor, settled by King Richard II in person, over 500 years ago, amply proves.

The absence of any definite code or set of rules in early times respecting armory is a clear indication that the law on the subject is wholely analogous to the common law, *i.e.*, it rests, not on statute, but on very ancient and long usage, continued down to the present time, without, as far as we know, any break or interruption whatever. Indeed it is not a little remarkable that even the turbulent period of the great rebellion saw no disturbance of the officers of arms, who pursued the duties of their office with perfect equanimity under Cromwell and Charles alike.

There is apparently no existing document which can be cited wherein is set out the precise functions of the kings, heralds and pursuivants of arms. The charter of King Richard III, granted in 1484, to the then Garter and his fellow officers, which many, in error, have assumed to be the authority for their powers, is merely a document forming them into a body corporate with seal and perpetual succession, with liberty to meet together for the purpose of transacting the business of their faculty. It is merely an incident in their history; and in fact this particular charter is but an example of the policy of that period, under which it became customary to grant charters to city companies, forming them into bodies

corporate. It is well to remember that in Scotland and Ireland the kings of arms and their colleagues still remain unincorporated.

The practice and law of heraldry in England has therefore to be gathered from the various royal grants and warrants and letters patent relative thereto, and from the practice and usages of the officers of arms, extending without intermission over a period of some five or six hundred years. It is a matter for regret that so far no adequate treatise of the law and practice of heraldry in England has as yet appeared,* for the text books that we possess deal mainly with the grammar of heraldry. The individual officers of arms are attached to the King's household, and upon certain of them, viz., the Kings of Arms, amongst other responsibilities, devolves the duty of assigning coats-of-arms and other hereditary family emblems to such persons as obtain the Earl Marshal's warrant for that purpose. The Officers of Arms receive from the King's Privy Purse fixed salaries, which are now almost nominal,† so that their income is mainly derived from fees, and to a very large extent depends on their own individual industry and reputation as genealogists. The rights and duties of each officer rest on the letters patent granted to him individually by the Sovereign, from time to time, upon being created King, Herald or Pursuivant, as the case may be. The very existence of the College as a body corporate wholely depends on the King's pleasure, for if he ceased to create

* *The Right to Bear Arms*, by X, which has reached a second edition, contains copies of many documents relating to the history and constitution of the College and Officers of Arms in each of the three kingdoms.

† *E.g.*, The salary of a pursuivant of arms is only £13 19*s*.

any more Officers of Arms it would obviously come to an end, and at the same time it would cease to be possible, except by direct grant from the Crown, to create any more *nobiles minores* with hereditary coats-of-arms.

The question of what arms are lawful and descendible to the heir has several times been before the Courts of Law,* chiefly in connection with disputes arising out of the provision sometimes met with in wills and settlements, under which it is directed that the successor shall assume the name and arms of the testator or the settlor. When it is shown that the arms used by the latter are bogus, *i.e.*, assumed by him *suo motu*, the clause is held to be inoperative, in other words, the Courts will refuse to recognise such coats as genuine. Moreover, it may be noted that baronetcies can only be conferred on gentlemen of coat-armour, and the proposed baronet must show that he comes under that designation, which means that he must be possessed of a coat-of-arms such as will be accepted as lawful at Heralds' College. In such cases mere voluntary assumptions, whether by the applicant or his ancestors, are entirely disregarded, and the ultimate and only test is whether the arms rest on a grant or ancient allowance by the heralds at some Visitation.

To justify the right to an assumed coat, or to a bogus coat, *i.e.*, one to which no title, resting on grant or allowance can be shown, it is not sufficient to allege that it was used at a time anterior to the incorporation of the Heralds' College, for, as already stated, that is merely an incident in the history of the heralds, and has nothing whatever to do with the right to bear arms.

Often it is alleged that a Heralds' College patent of

* See the various cases set out in the Appendix.

arms is a grant which may be obtained by anyone on payment of certain specified fees, the suggestion implied being that modern grants are worthless, as being readily purchasable by the man in the street for filthy lucre. Such, to those who know the practice of the College, is notoriously not the case, though there is no precisely defined rule as to whom arms may be granted or refused. The issue of a warrant by the Earl Marshal is purely a matter of grace, and each application is judged upon its merits. To persons in certain classes of Society arms will be granted at once without question, to others with equal certainty they will be denied. It is no use complaining that there is no hard and fast rule when we are dealing with what is a matter of grace. We might just as well grumble at the haphazard creation of peers, baronets and knights.

Of late there has been put forward, and advocated with some show of energy, a theory that it is open to any man to adopt and use what arms seem good to him. Sir George Sitwell, who has investigated, with some minuteness, the meaning and origin of that somewhat obscure term "gentleman," suggests that in the middle ages it was synonymous with "freeman," and says that such did, without intervention of heralds, assume to themselves coat-armour, though he does not assert that they did, or could, create to themselves hereditary estates therein, such as would confer on their descendants the right to use the same coat as had been irregularly assumed by their ancestors. Obviously therefore, if such be the case, since now we are all free, there is clearly no obstacle to a crossing-sweeper taking to himself such a coat as—Gules, a pair of brooms in saltire covered with mud proper. For after all, the crossing-

sweeper, who buys his own broom, is a freeman, a capitalist, and his own master, and not dependent on a yearly wage, like high-placed Government officials.

It may be that this view—that individuals can assume such arms as they please—has some basis for us nowadays in the fact that there is no positive enactment* prohibiting any subject of the King, when no fraud is contemplated, from assuming or inventing for himself arms or honours such as his imagination may devise. No more serious harm than the general ridicule of his friends and neighbours would befall a man who advertised in *The Times* that he was the Duke of London and Marquess of Fleet Street. But that assumption would give him no exclusive right to such a style, nor could he create any estate of inheritance therein, such as might descend as of right to his son. It would not give him any claim to admission to the House of Lords, nor, of course, any legal right to such an honour. The voluntary assumption of a coat-of-arms obviously stands on the same footing; and just as no length of prescription gives right to the title of Duke of London, so no prescription can avail in the case of arms, and long-continued usage through many generations is of no value in England when their validity comes to be prosaically examined, either by the College of Arms or by the ordinary Courts of Law, for such purposes as the assumption of names and arms, or the creation of a baronet. We must remember that an individual cannot

* This appears to be so in England, but in Scotland there is a series of enactments under which the unlawful assumption of arms is forbidden under the penalty of a hundred pounds. See extracts from the principal Act in the Appendix.

create for himself an estate of inheritance in the bogus arms he or his ancestors have assumed.

Put plainly, and treating it from a practical common-sense point of view, the use of a coat-of-arms is an implied intimation to the world at large that it is borne *lawfully*,* and the uninitiated conclude that it is from Heralds' College. Therefore, if it be not borne *by right*, its use is then, to all intent, a mere fraud on the world at large. The fraud may be, and often doubtless is, perpetrated in genuine ignorance, but all the same it remains a deceit. Of course it would be another matter if the user boldly proclaimed that he or his grandfather invented the arms, and made it clear that they were not derived from the Sovereign, directly or indirectly through the College of Arms. But such candour is unknown. If it be pointed out that the arms cannot be found at Heralds' College the rejoinder usually is an allegation that the College records are imperfect, or that the officials have carelessly omitted to record the coat. Yet nothing in the shape of evidence is ever adduced in support of the statement.†

Free trade in armory, or in the creation of titles, is a proposition in favour of which a liberty-loving Briton might adduce many cogent arguments, but if every man is to be a law unto himself in such matters, it is evident that there must soon be an end of the science of armory,

* The precise meaning of the word "lawful" in relation to coats-of-arms is fully dealt with in the case of *in re* Croxon, *see* Appendix.

† It is of course obvious that the *onus probandi* rests with the person asserting claims to a coat-of-arms. If the officers-of-arms, who have a continuity of succession of five or six hundred years, find nothing in their records about him and his coat, and he himself adduces in support of it no evidence, as lawyers understand evidence, he can hardly complain if his shield-of-arms be styled "bogus".

for of necessity it would soon become as nondescript, and as uninteresting, as the monograms with which we decorate or disfigure our note-paper.

So long, however, as the Sovereign grants titles, honours and arms, there must be some rules prescribing the mode by which they are to be granted and used. And as regards arms, with which we are now concerned, although it is easy to pick holes in the constitution and practice of Heralds' College, and equally easy to make suggestions for its amendment and reform, it is difficult to see what better authority could be devised than those officers who have existed as a chartered corporation for more than four centuries, and in fact as the authority in armory without intermission for a far longer period—a period indeed whereof the memory of man runneth not to the contrary.

Those, however, who cannot obtain personal distinction from the recognised sources of honour, can console themselves by taking refuge in the Primrose League, Foresters, Oddfellows, Antediluvian Buffaloes and the like. There they will find honours awaiting them, distributed freely and, more or less, according to merit. And they will not be harassed by the disapproval of the Earl Marshal, or the wrath of Kings, Heralds, or Pursuivants or any other effete survivals of a feudal system of honour.

It is worth while to realize that a certain analogy may be observed between the use of registered trade-marks and authorized coats-of-arms. The Registrar of Trade-marks will, for a trifling sum, record any device submitted to him, provided it complies with certain definite rules, one of which is that it must not be the same as a trade-mark already on the register, or a colourable imitation

thereof. Once registered it becomes the absolute property of the applicant, and may be assigned to others as he may think fit. And anyone infringing this mark, or using a colourable imitation thereof, may be restrained by an injunction in Chancery. This may, in theory, be an infringement of the liberty of the subject, but in practice no harm results therefrom.

In the case of arms, there is not the same liberty for every one to adopt and register his home-made coat-of-arms, for coats-of-arms are not granted (whatever the popular idea may be) to all and sundry who apply for them, whilst their devolution is usually limited to the grantee's descendants according to certain prescribed rules, and, unlike trade-marks, they are not assignable. Moreover, the arms granted must, like trade-marks, be absolutely distinct from any other coat-of-arms already recorded. Having regard to the nature of arms and their object, that of providing a distinctive symbol or family mark or emblem, it can only be regarded as a scandal that they should be openly pirated by persons having no better title to them than a similarity of surname, or, as often happens, not even possessing that very shadowy right. It is surely not too much to suggest that the legal owners of a coat-of-arms or, so to say, an hereditary family mark, should have the right of restraining by injunction in the Court of Chancery, or in the Court of Chivalry, those who infringe their privileges and their rights, for which they, or their ancestors, have paid certain fees to the national revenue, as well as to the College of Arms.*

* Perhaps if this point were tested it would be found that such a right does exist. Except, however, in Scotland, it seems to be obsolete or in abeyance.

In attacks upon the College of Arms much stress is laid upon such questions as the negligence of the officers in times past to keep their records with fulness and accuracy. It is obvious that such questions are in reality wholly irrelevant to the main issues, which are, *first*, What is the legal character of arms and the distinction between true and false arms? and *secondly*, Is the College of Arms the appropriate body for dealing therewith? All the same, it is obviously right that full attention should be drawn to any *lâches* or irregularities on the part of officers of arms.

Heralds' College is a public institution, and as such must expect public criticism. Of honest comment no one should be afraid.

It may be worth while, therefore, to examine some of the complaints which have of late years been put forward with much persistence. One complaint, that the heralds grant to new men the arms of ancient feudal families, must be met by a simple negation. It is not done. What has given colour to this notion is the practice followed when some one who, in ignorance of his legal position, has used arms to which he can show no lawful right, asks for a grant of arms. In such cases, as a matter of courtesy, though not as a right, every effort is made to grant him arms as little dissimilar as may be possible to those he has been using in honest ignorance of his position, but, all the same, so many differences will be made as will render it quite certain to those who understand armory that they are not the same arms. If he were to show a very long user, extending over say a couple of centuries, of arms the same as those borne by another family of the same name, and if a probable (even if not proved) descent be shown from them, it is likely

that the "differences" assigned to him will be less marked than in a case where the user is more recent and kinship very doubtful. Such grants are obviously new arms, and do not justify the assertion that it is customary to grant the insignia of ancient families to mere upstarts of the same name.

Another complaint frequently made is that the arms granted in recent years are usually irretrievably bad in their design, and that they betray unmistakably their modern origin. With the latter part of the complaint it is impossible to feel any sympathy, for the implied suggestion that the heralds should deliberately minister to the vanity of Novissimus by granting him a sham antique coat-of-arms, is merely a fraudulent proposal. The one great merit of Victorian heraldry is the ease with which, as a rule, it is possible for the expert to date it. There is, however, no gainsaying the statement that modern heraldry has often been, from the designer's point of view, hopelessly bad, mainly by reason of the number of minute changes and differences introduced, which too frequently crowd up the shield and disfigure the crest and thus defeat the object of an heraldic achievement, which, above everything, should aim at boldness and simplicity. It will usually be found that such cases mostly occur when a family has been using without right the arms of some other family. In such cases the heraldic authorities, determined that there shall be no mistake that the new grant is not the same as the coat-of-arms formerly used, insert so many minor changes and slight distinctions that the armorial effect too often is quite spoiled. If only the grantee would boldly face the position and be content with an entirely new coat-of-arms, he would, as a rule, avoid

this complexity and obtain a reasonably simple achievement.

In preparing the design of a coat-of-arms, it must be remembered that there are usually three concerned, the grantee, the herald, or pursuivant, who puts forward the design, and the kings of arms, who finally sanction it. When we remember that all heralds are not possessed of equally good heraldic taste, that applicants sometimes wish to perpetuate bogus coats, at other times to give their life history after the fashion of a modern bookplate, there is little need to be surprised that the results are occasionally, to put it mildly, unhappy. A debased taste in art was undoubtedly prevalent in the early Victorian era, and it would be too much to expect that heraldry should rise higher than the general artistic standard of the period.

Various remedies have been suggested to ensure that coats-of-arms shall in their design exhibit better artistic taste than too often has been the case, amongst them being a proposal that the ultimate decision as to any new design shall be vested in the Chapter of the College. If there be anything more certain than another it is that a committee is about the worst possible authority for deciding points of taste, and there is no reason to believe that the corporate characteristics of a Chapter of the College would differ from those of any other committee. As already mentioned, under the present system a coat-of-arms is usually the joint result of deliberation between the applicant, the herald who puts forward the petition, and the kings of arms who have to sanction it. In this way a proposed coat may sometimes be spoilt, but the applicant can at least discuss his views with the herald, who will submit them to the kings of arms. Hopeless

indeed would be his plight had he to satisfy the individual idiosyncracies of the baker's dozen, or even the majority of them, of whom the College consists.

Yet another complaint was lately made, and even treated as a serious grievance, that the heralds declined in a certain grant to extend its limitations so as to include the second cousins of the grantee. Now the usual course is for a grant to be made to the grantee and his descendants. In some cases it is extended, *ex gratiâ*, so as to include the descendants of his father, and occasionally, as in the instance just mentioned, it will include the descendants of specified uncles. It is difficult to deal with such a complaint seriously, for if second cousins are to be included, why not third and fourth cousins, and even more remote kindred. Indeed this occasional practice of including first cousins is quite generous enough, and it would perhaps be better to confine such grants to a man and his brothers at most. It might be a point fitting for consideration whether some modification of fees should not be made in those few cases in which sets of first cousins on the same occasion seek to become armigerous. It would obviously be reasonable that the fees payable on a wide grant should be heavier than where the limitations are to a man and his descendants only.

Of late there has been an attempt to specially exalt arms which were borne in the middle ages, and whose use has survived to our own day. One writer, Mr. Joseph Foster, talks of arms "borne in the age of chivalry," though it would be hard indeed to define with any precision that vague period in the world's history, and says that no interference therewith by the College of Arms can be permitted. This proposition, of course,

is merely a nine-pin set up by that writer for the purpose, it may be presumed, of discrediting the College; for the idea that the officers of arms desire to interfere with any ancient coat lawfully borne is mere absurdity, since they have no such power, over either ancient or modern coats. Thus if some new man named Talbot came to the College with a claim to use the arms of Lord Shrewsbury, no officer would admit or certify his right thereto, until he had first proved a pedigree showing his descent from the house of Talbot. If he proved such a pedigree, his right to the Talbot arms would at once be recorded without hesitation, though he might be in rank but a mere labouring man. The possessor of a coat dating from the "age of chivalry" has no greater armorial or social privileges than he whose coat is a twentieth century grant. Obviously, greater prestige attaches to an ancient grant than to a new one, but it is merely "moral," and is in fact a prestige similar to that of the premier duke and premier earl, who take precedence over junior creations. Any attempt to form an exclusive class or caste of feudal gentry is much to be deprecated, for it is opposed to the whole spirit of heraldry, which is a living science, and far more concerned with the twentieth century than with the archaic survivals of the fifteenth.

The advocates of legality in the use of arms generally state that only those coats are regular and genuine which are on record at Heralds' College. Broadly speaking this is the case, and no amount of prattle about arms borne by tradition or prescription can alter that simple position. One writer who challenges that proposition replies that the records of the College of Arms are not conclusive, alleging that there exist many grants which are not on record at the College, though without fur-

nishing any evidence in support of this assertion,* while it is also said that descendants of those who carried armorial ensigns at the Battle of Agincourt are entitled thereto, without further proof or grant. But all this is merely of academic interest. The ordinary citizen need not trouble himself about the heroes of Agincourt, for few indeed there be who can deduce their descent from them, and as to unrecorded grants, the happy possessor of such may rest content in the knowledge that he has a good title thereto, and that his rights depend on the grant, and are not lost by any possible imperfections in the heralds' register. If his unrecorded grant be genuine it would be admitted by the officers of arms, and would be recorded at once in their books, and doubtless free of all charge to the applicant. It is hardly worth while to seriously combat the suggestion that because the College has perchance omitted to record some coats, there exists a presumption that others are genuine when their users can show no title whatever thereto.

It is right enough to reprobate any negligences of the College in failing to record arms which may have been granted in times past. But what are we to think of the negligence of the family which fails to take ordinary care of its patent of arms, and cannot produce it, or any evidence of its existence, when the authenticity of the arms used is called in question?

To the question of prescriptive usage as applied to coats-of-arms, an anonymous writer in the *Ancestor* has lately devoted some attention, and he quotes a letter (which he evidently regards as conclusive authority,

* That the older records of the officers of arms were not kept so carefully as is now the case is indicated by the instance of Cox *alias* Hayward, mentioned hereafter.

though he does not show that it was an "official" communication) of Sir William Dugdale, written in 1668. That famous Garter, writing to a herald painter, states of a certain claim to arms that he would allow it if the arms had been used "from the beginning of Elizabeth's reign or about that date, for our directions* are limiting us to do so, and not a shorter prescription of usage." This anonymous writer, commenting thereon, states, and even italicizes his statement, "that this prescription was under a hundred years," an evident arithmetical oversight on his part, for which it would be unkind to reprimand him in the acidulous manner now too common with heraldic writers.

The question of prescription, however, cannot be settled by an *obiter dictum* of even so famous a genealogist as was Sir William Dugdale, whose authority on the point is certainly no greater than that of his distinguished successor, Sir Albert Woods, who had the experience and practice of some two hundred years more to serve as his guide. It would be more to the point to find out what authority Sir William had for setting up this prescription of a hundred years. It is probable he had none, and that in following this rule of a hundred years he by a good-natured laxity set up inferentially, in support of the prescription claimed, a "lost grant," a favourite legal fiction. The period of prescription, except when explicitly altered by statute, is the constantly-receding date of the first year of the reign of King Richard the First, a date at which heraldry was

* Even if Dugdale had received such "directions," which could only emanate from the Earl Marshal or the King himself, it would still be requisite to show that they continued binding on his successors, or that such directions were from time to time renewed.

still in the embryonic stage. If it be suggested that custom is law in the matter, and that an isolated *obiter dictum* of a seventeenth century Garter, addressed in an unofficial letter to a mere herald painter, is sufficient evidence of such a custom*—then it may be replied that customs may become obsolete, and that the long-settled practice of the modern kings of arms may be a better and safer heraldic guide than any of the doings of Sir William Dugdale. It is strange that the *Ancestor*, whilst rejecting the puerile pedantries of Elizabethan heralds, is willing to accept the irregularities of a seventeenth century Garter. Put briefly, the position is this: Would the High Court of Justice issue a mandamus to Heralds' College compelling the officers of arms to accept and record armorial bearings the claim to which is based on mere prescriptive usage? If not, then, *cadit questio.* "Prescription," after all, is a legal rather than an heraldic question, and as applied to coats-of-arms it is to be discussed in the same way as we should discuss "prescription" as affecting titles of honour.

Probably the greatest deterrent to the use of bogus arms would be the publication of a list of all known grants of arms, with an intimation that only those were entitled to use them who either were themselves grantees or who could show descent from a grantee in accordance with the limitations of the respective patents. Something of the sort for Scotland has been done by the present Lyon King in his *Ordinary of Scottish Arms*,

* The decision as to the validity of "custom" is obviously a matter for the law courts and the officers of arms. The existence and validity of "custom" in the College of Arms has been recognised by Parliament and the Courts of Law, and as these recognize the officers of arms as the lawful authority, we must look to them for the interpretation of what is "lawful" in matters heraldic.

which has reached a second edition. In England, where arms are far more numerous, and with records dating back to a much earlier period than is the case in Scotland, such a register would be a much more serious task to undertake. Still a start might be made by printing a list of those who have recorded arms during the last 250 years, leaving the arms granted at an earlier date, or allowed at the visitations, to be calendared separately. Perhaps the main objection to such a course would come from some of those who have but recently acquired arms, but that would be no sufficient reason against it, and as a matter of fact no such protest has been made against the publication of Lyon's list, which includes the names of grantees down to the date of issue. Similarly, it might be expedient to publish officially the lists of "disclaimers"* at the various heraldic visitations, though it would be chiefly of antiquarian interest, since in many cases the descendants of "disclaimed" persons are now armigerous.

The allegation, recently put forward, that arms have been granted to a pill-making chemist, to a doormat dealer, and to the late Mr. Barney Barnato, has been made with the evident intention of disparaging the grants made at the College of Arms, the obvious innuendo being the illnatured one, that those persons, even when holding the status of magistrate, are not sufficiently respectable to be admitted to the same rank of gentry as those using arms which date "from the age of chivalry". It is passing strange that such a complaint should be made at the present day, and it shows that the heralds

* An unofficial list of Disclaimers was printed a few years ago by Mr. J. P. Rylands.

are more truly democratic and more reasonable than their critics. It would, indeed, be a misfortune to the country if the theory that a man of humble origin should for ever be barred from raising himself in the social scale (even if no higher than is applied by a grant of arms), when by his industry he has attained such a position as to justify the use of armorial bearings, should ever receive general support, or should be approved in any responsible circle.

What in heraldic practice has often been much criticised, is the fact that whilst some *novus homo* who, or whose father, sprang from humble origin, may become a gentleman of coat-armour, there are many wealthy and educated families who have held "county" rank for a century, or even longer, and yet are "no gentlemen", and in the technical language of the heralds are "ignoble". Whatever may have once been the case, with the meanings now attatched to the words "gentlemen" and "ignoble", it is obviously impossible to now apply those terms with the restrictive meanings of the 16th century heraldic writers. It would, of course, be a pedantic impertinence to refuse the style of "gentleman" to, say a judge, a bishop, or a general in the army, or to dub all such "ignoble" merely because they do not possess coats-of-arms. There are "gentlemen" and "gentlemen of coat-armour". And this distinction in practice agrees with the custom of the kings of arms, who in their grants frequently style as "gentlemen" persons who never possessed coat-armour, and certainly it may be taken to be in accordance with courtesy and common-sense. If, however, "county families" are content to rest without any hereditary family emblems, as we may style coats-of-arms, it is a matter which concerns them alone. But

in such cases we may at least expect them to abstain from flaunting before us sham crests or bogus coats-of-arms and pretending a legal right thereto.

There are, no doubt, many little points on which the present practice of the College of Arms might be usefully varied. For instance, it is difficult to see why grants of arms should not be gazetted in the *London Gazette* like other dignities. Possibly some few grantees might not like it, as it would, of course, imply that they were new men, or that the arms that they had hitherto used were unauthorized or merely bogus. But the desires of those who wish, if such there be, to impose on their friends and neighbours by figuring as ancient gentry when they are in truth modern, need not, one would think, be taken seriously.

It may also be asked whether there be any reason why the College of Arms should not be the office wherein to record the recipients of all honours given by the Sovereign, whether peerages or such simple decorations as a mere V.D., and also the devolutions of hereditary titles.

Another useful heraldic reform would be to prescribe that all peers and baronets, on succeeding to their titles, should enter their pedigrees at the College of Arms, showing the derivation of their titles from their predecessors. To those in the direct line this could scarcely be a hardship, for it would usually mean little more than the production of a couple of certificates and an affidavit or declaration of identity. For collaterals it might sometimes be a considerable expense; but after all, a gentleman who wished to become a peer or a baronet, merely at the cost of proving his pedigree, might well consider that he had obtained his honour cheaply. He need not

assume the dignity unless he wished, but, if he did so desire, it is surely not too much to expect that he should be able to prove that he has a right to the title. Such a regulation, if feasible, would do much to stop the pretensions of doubtful baronets, which of late have become a scandal.

Further, as coats-of-arms are hereditary honours emanating from the Crown, it may fairly be suggested that corporations and individuals holding official positions should not be allowed to use coat-armour unless they can show that they are entitled thereto. Such a regulation would prevent the absurdity, seen a few years ago, of a member of the Corporation of London, flaunting as his own, in a civic procession, the arms of Egerton, on the very insufficient allegation that they belonged to an ancestor in the female line. Those holding official positions under the Crown should certainly be debarred from using arms which are obviously in contempt of the royal prerogative. No compulsion, of course, should be used to induce such persons to take out grants of arms, the use or expense of which might be distasteful to them, but the duty might well be thrown on Heralds' College of informing all, such as sheriffs or mayors, on their appointment, that they must not presume to use arms in their official capacities without first obtaining a grant, or showing that they already possess the right. Especially should this notice be given to the numerous corporations which, in fungus-like manner, have sprung up within the last few years. They are as great offenders as individuals, and with much less inducement.

In Tudor times, short and drastic were the methods adopted by the heralds with regard to bogus coats-of-arms, for they did not hesitate to deface them when found

affixed to monuments, or otherwise made use of in a public manner. Such high-handed proceedings happily would not be possible at the present day, but the same end—their disuse—can be attained by other means. One would be, as already suggested, the official publication of lists of grantees during the last 250 years. Another would be to make clear the right of the owner of a coat-of-arms to obtain an injunction against a wrongful user, and lastly, as just suggested, to deny the use of coat-armour to corporations and individuals in official positions without first showing right thereto, of which obviously the simplest mode would be to produce a certificate from the College of Arms, or from Lyon or Ulster's office, as the case might be.

After all, heraldry is still a matter of twentieth century interest, and the subject should be dealt with in accordance with the dictates of twentieth century commonsense. We can discard largely the pedantic rules of Elizabethan writers, though we need not follow the bald blazonry of the Middle Ages, any more than we should expect a modern poet, who avoided the Latinisms of the Renaissance, to adopt the primitive diction of Geoffrey Chaucer. We must recognize that unless heraldry is to become mere chaos, armorial bearings must be borne according to rule, and that no rule is so convenient as that which recognizes that lawful arms are those which rest on grants from the Sovereign through his authorized officers. In a word, let arms be confined to those whom ancient records and the long practice of centuries show to be properly entitled thereto; and let us advocate simplicity as far as possible in coats-of-arms and the rules governing them, even though that desire is to be tempered by the knowledge that the science of armory

in our day must be more intricate than it was in its early history, five hundred years ago. Finally, those who wish to play the game of Heraldry may fairly be asked to play according to the rules, and what those rules are can be best learnt from the officers of arms, from the judgments of the Courts of Law, and from the Statutes of the Realm.

July, 1904.

CONCERNING PRESCRIPTION.

A POSTSCRIPT.

THIS pamphlet has attracted some attention, an evident proof of the interest taken in matters heraldic. That lately established magazine, *The Ancestor*, notable for its artistic illustrations and "racy" articles, which seeks to "legalize" bogus heraldry under the guise of prescription, has devoted much space to controverting the simple position taken up in this pamphlet. The Editor of that magazine gave to this pamphlet some twenty pages. Much of what he wrote dealt with the laxities and blunders of past heralds, and stories of pedigree hoaxes, while quips and cranks and merry jests complete an amusing article. But the Editor of *The Ancestor* is not a lawyer. The remembrance of this, and possibly the fear that his paper might be regarded as the special pleading of a biassed advocate,* may be the reason why Mr. W. P. Baildon has supplemented this by an article of 41 pages, in which he seeks to establish "prescription", the right to assume arms *proprio motu*, and the right to assign them. Mr. Baildon is a barrister, versed in ancient records, one of those known as "black letter lawyers," and his remarks demand an attention which non-professional writers cannot claim. It may therefore be well to consider his arguments and the position he has taken up. Mr. Baildon attempts to show that the

* It is said that the Editor of *The Ancestor* must be numbered amongst those who use a "bogus" coat-of-arms.

analogy between coats-of-arms and titles is untenable, and proceeds to adduce titles of honour borne by prescription as being "well known and still recognized," and quotes the Irish title, "The Knight of Glyn," and the Scotch style, "The Master of Elibank". But Mr. Baildon knows well enough that these are merely matters of courtesy, and no more confer legal rights than does the traditional style of "Queen of the Gipsies", or the claim of a circus owner to be "Lord John Sanger".

Then as to the analogy to real property law. Prescriptive ownership by a twelve years' occupation of land is wholly a creation of statute, and so is the consequent estate of inheritance which may arise therefrom, and until the statute is explicitly extended to coat-armour, the statement remains true that an individual cannot create an estate of inheritance in the bogus arms he or his ancestors have assumed. When the law of arms is assimilated in this respect to land, we may yet hope to prescribe for arms on the strength of a twelve years' old Christmas card.

Further, Mr. Baildon has collected together a plethora of authorities for his proposition that the kings-of-arms recognized "prescriptive right" to bear arms. These authorities range over the period 1394 to 1671, but are mostly of the century preceding the Restoration, and consist mainly of recitals in grants and confirmations by the kings-of-arms. A large number of these cases are concerned with the grant of crests in cases where there was already an existing coat-of-arms, and the instances quoted include very many in which the kings use the expression "may *lawfully* bear," and also frequent references to searches in the registers and records of Heralds' College.

It is perfectly evident from Mr. Baildon's examples that the officers of arms, when approached by a person using arms but not knowing by what right he did so, first searched in their own records for the evidence, just as they do in the twentieth century, and if they found a grant recorded there they recited it; if they could find no grant recorded (and the absence of such a record did not at that date necessarily imply that no grant had been made*), then they put the claimant to his proof. What proof was considered sufficient evidently depended very much on the officer considering it. Some were strict, others evidently discreditably lax. Glover, in 1584, allowed arms on the strength of a coat engraved in an old silver bason, while the famous Dugdale, in 1666, still more lax, was satisfied with a seal belonging to the claimant's father, who had died but 18 years before!

If arms can be "lawfully" borne by prescription, that is, that self-assumed arms are lawful without the need of formal grant, it is difficult indeed to understand with what object the various claimants approached the officers of arms with their petitions to have their arms "confirmed," or to have formal grants of crests. Clearly, in Mr. Baildon's view they were already sufficiently entitled thereto, and if they had chosen to invent for themselves crests, which many regarded as a needful addition, there was nothing to stop them doing so, and in due course of time to "prescribe" for them as their rightful possession.

* A late instance is that of Cox *alias* Hayward, mentioned in the Visitation of Gloucestershire, 1683-4. Arms were granted to Thomas Cox *alias* Hayward by Bysshe, Clarenceux, 26 May, 1666, but they are not in Sir Edward's grants delivered into his office.

The fact is these claimants were not so foolish as Mr. Baildon would have us to imagine. They realized, though he does not, that recognition of arms by proper authority was necessary for their lawful use, that while they were not approved by the king's officers of arms as "lawfully" borne they ran considerable risk of having their armorial ensigns defaced by the heralds, and to suffer the ignominy of being proclaimed in their respective market towns as "no gentlemen"—*ignobiles omnes.* Hence the various applications to have the arms "confirmed", arms which we may well suspect in some cases were self-assumed, and some after all not so very ancient. A search in the Heralds' Office had the frequent result that the alleged arms could not be found "on record", or the arms were found but a crest was lacking. What was to be done? The claimant might hint that the records of the College might not be perfect, and the herald of that day would sorrowfully admit that was so. For though heralds had existed long before, the College had been incorporated no more than a century or so,* and its records were not so complete nor were they kept as carefully for many a long year after as we now understand is requisite for public records. Besides, the official records of old families, before 1484, depending as they must have upon the diligence of individual officers of arms, would have been in a still more deplorable state.

Yet the applicant must not be prejudiced by this. The officers of arms would answer him, Show us some sufficient evidence to satisfy us that your family is an

* The charter of incorporation of the Heralds is dated 2 March, 1 Richard III, 1484.

armorial one, and, even though the records be deficient, we will "confirm" the arms to you, but as you can show no crest, for that you must get a *new* grant, so that you may *lawfully* bear both crest and arms. Then would the family charter chest be rummaged over for some old seals with arms upon them, silver bowls would be looked at, church windows scanned for evidence to satisfy the heralds that the arms were lawful, and no mere modern "bogus" assumption. The sufficiency of the evidence would vary, as Mr. Baildon's extracts show, with the persistency of the claimant, and with the strictness of the rules enforced by the particular king of arms to whom it was referred. Some officers would take a stringent view and bluntly reject the case, or "respite it for better proof"; while others, more lax or good-natured, would strive to stretch a point in favour of the applicant.*

The whole procedure seems very modern, and in fact differs nothing in principle from the procedure of the present day. Only now, as the records of the College of Arms for the last two hundred years or more are complete, it is quite impossible to set up a claim to arms when the explicit evidence of the books negatives it. What view the officers of arms would take of any claim to arms on the ground that such arms had been continuously in use by the family of the claimant from a time anterior, say, to the reign of Henry VIII it is impossible to say, but it would not be very surprising if they followed the practice of their predecessors and confirmed them. But such a "confirmation" would depend upon the nature of

* Yet even Dugdale sometimes rejected claims put forward. The well-known Nottingham family of Gregory, which "began from the lowest beginnings" set up a claim to arms and a gentle origin. But Dugdale rejected it, and compelled them to take out a new grant.

the evidence submitted, and would be a matter of grace and not a right. Thus the applicant got his "confirmation" from the heralds who, following a common legal fiction, assumed a "lost grant". In fact the whole theory of a "confirmation" of arms rested then, as it still does in Ireland, on the presumption of the "lost grant". It may have been, in many instances, a somewhat transparent excuse to legalize arms for which there was no authority whatever. But to regularize informalities by some "legal fiction" was, as the most elemental student of jurisprudence knows full well, a device of bygone lawyers, if indeed it be wholely extinct. To admit a "right" to arms by prescription would be to deprive heraldry of all authority and value, for no one would be simple enough to seek for arms from the king's officials if he realized that by once adopting and continuing to use them, he and his descendants in a few years would acquire an indefensible prescriptive and exclusive right thereto. In sober truth, this doctrine of "prescriptive right" to arms is but a grotesque and foolish device for soothing the conscience of the user of bogus arms. It is surely no reproach to the officers of arms that their records for the last two hundred and fifty years or more are so complete and carefully kept that the non-appearance therein of a claimant's name, or that of his ancestor, is *prima facié* evidence that his claim is worthless. Neither can we complain that at Heralds' College stricter views of the nature and value of evidence are now taken than was the case in the days of Queen Elizabeth.

From amongst the numerous examples gathered together by Mr. Baildon it may be useful to select a few instances of the "recitals" by former officers of arms in their grants and confirmations. Thus :—

1536.—Hath required me to *search* through *all my registers* for the very *right arms* of his said ancestors . . . . which arms I . . . . ratify and confirm.

1552.—So as he and they may *lawfully* bear . . . I have ratified, confirmed, assigned and set forth.

1581.—Being required . . . to *make search* in the *registers and records of my office* for the ancient arms . . . do find that he may *lawfully* bear.

1584-5.—Haec *arma confirmantur* Leonardo Bate . . . et *crista* eodem *conceditur* . . . ita quod crista spectabit Leonardo et non Willelmo . . . nepoti suo.

1634.—Wheareas W. Robinson is desirous to alter and change his creaste and some parts of his arms.

Throughout these and the other examples runs the same note, that arms must be *lawfully* borne, and it is quite evident that, for a decision of what arms are *lawful*, it was then needful, as it still is, for the applicant to take the opinion of the officers of arms.

Now, too, we may quote also from Mr. Baildon some examples of the lax views of evidence long ago entertained by certain of the officers of arms.

1584.—Authority recited, "sigillum antiquum ex argento sculptum".

Another—"ex antiquo sculptura olim in fundo pulvinaris".

1666.—[Dugdale] . . . "for proof of these arms he voucheth his father's seal, who died [1648] at the age of 88".

But a little later the views of the officers of arms became more stringent, and we may now instance some cases, not given by Mr. Baildon, to show the gradual improvement in the practice of the Heralds' Office.

VISITATION OF GLOUCESTERSHIRE, 1682-3.

Archard.—Taken from a funeral escutcheon, therefore better proof must be made.

Arris.—Mr. Arris exhibited these as his arms, but there is nothing to be found to justify the bearing of the same.

Baghott.—Qy. if the crest was not granted to Sir Tho. B. and his descendants.

Bateson.—Not allowed till further proof.

Bourne.—But vid. c. 30-54 where these arms were granted to Sir John Bourne, of Battenhall, co. Worc., so this family can have no right to them.

Cook.—Mr. Cook produced a seal . . . . but nothing to be found for proof.

VISITATION OF WILTS, 1625.

Younge.—A patent granted to John Younge 1572 by Ro. Cooke, Clarenc.

Fawconer.—Produced a coat, but without authority, and therefore respited for better proof.

VISITATION OF WORCESTERSHIRE, 1682-3.

Bull.—Mr. Bull exhibited these his arms but nothing to be found, therefore must make better proof.

Bourne.—That arms were granted to Sir John Bourne, of Battenhall Ao. 1 Marie, from whom it does not appear that this gentleman descended.

These examples might easily be multiplied, but they suffice to show that the practice of the heralds has been uniform in insisting that proof must be shown of a right to the arms claimed. Obviously the best proof was the production of a grant, that is, sound record evidence; that class of evidence which the Editor of *The Ancestor* insists, and rightly so, is needful for proof of pedigrees, though, with a strange inconsistency, he is ready to swallow any cock-and-bull story in proof of coats-of-arms.

No doubt that anciently the heralds often admitted, *ex gratia*, a right on very inadequate evidence, and once having done so were "estopped" from afterwards denying the claimant's right to arms, and if the disaster of a fire should hereafter consume the records of the College of Arms, it might become needful for the heralds to relax the stringency of their present rule.

Mr. Baildon proceeds to quote *The Boke of St. Albans*,

a book* of little value and of uncertain authorship, expressing the ideas of heraldry held by a fifteenth century bookmaker. Mr. Baildon points out that this writer divides arms into four, or rather five, classes.

1. Arms borne by descent.
2. Arms borne by conquest in war.
3. Arms granted by a prince or lord.
4. Arms assumed by the bearer, and
5. (Doubtfully), Arms granted by a herald.

The first is still the most common title to the bearing of arms. The second, "conquest," is obsolete, and is doubtless contrary to international law. The third, arms granted by a prince, *i.e.*, the sovereign, is the method now followed for obtaining a new grant of arms, as the kings of arms have their authority from the sovereign, and can only exercise it in strict accordance with the term of their patents.

Mr. Baildon labours also to justify the statement that "other lordys" have the right to grant arms, and he cites several grants by such, two being by the Marquis of Worcester to Thomas Bayley and Lewis Morgan in

* As a lawyer, Mr. Baildon hardly needs to be reminded that the judges of the High Court would not allow him when pleading to cite text books as authorities. As for this particular "text book," if we can so dignify it, on which Mr. Baildon would have us base our view of heraldic law, it may be well to remind him that the last Editor thereof, in 1881, suggested that "Heraldry run mad," would have been the most appropriate title for the heraldic portion of Dame Juliana's book. And the reviewer of this book would fix as "the date of the commencement of the decline of heraldry the date of the publication of *The Boke of St. Albans*. Its author was a mere bookmaker . . . little above the writers of the heraldic manuals published as advertisements by the seal engravers of the present day." And this is the book, "got up for sale", which Mr. Baildon, a counsel learned in the law, puts forward in *The Ancestor* as our guide to medieval heraldic law!

1655-6, during the Commonwealth. The lateness of the date is remarkable,* it is the last echo of the claim of the magnates of England to act as princelings entitled to grant to their retainers liveries and badges. But that the Marquis of Worcester made such grants no more proves that he had the right to do so than do the pranks of M. Jacques Lebaudy prove that he is Emperor of the Sahara. The silence of the officers of arms does not help Mr. Baildon's contention ; it might be otherwise if he could show that the Marquis's "grants" had been entered at Heralds' College.

Even were we to concede that these and earlier "grants" cited by Mr. Baildon were valid and lawful, it would still be requisite for him to prove that the law is still unchanged. In other words, is Mr. Baildon, as a counsel, prepared to advise any armigerous client that he has the right to assign and convey his coat-of-arms, and to enter into the usual covenants with the purchaser for "quiet enjoyment," etc. ? If he cannot do this, all the instances he has so laboriously collected are, as no doubt is the case, merely matters of historic interest. As well might he seek to persuade us, by the evidence of fifteenth century grants of villeins, that twentieth century lords of manors ought yet to sell their tenants as serfs and villeins with all their sequels. After all, a black letter lawyer is not always the safest guide to modern day law, even in matters heraldic. Too often the student of the past fails to realize how great a change, both in law and in custom, is effected by the lapse of the centuries.

* The writer can supply a still later example. A certain noble *duke*, who shall be nameless, in the last decade of the nineteenth century, gave permission to a local golf club to assume the ducal crest !

Appendix of Statutes and Cases.

An Act to enable Edward Hicks, gentleman, to use and bear the surname of Hicks, and the arms of Hicks quarterly with those of Simpson, in compliance with the Will of the Rev. James Hicks, deceased.

In 1836 an Act of Parliament (6-7, Will. IV, Cap. 42) was passed for the express purpose of enabling Mr. Edward Hicks, formerly Simpson, to assume and quarter with his paternal coat the arms of another family of Hicks, to which he was in no way legally entitled. In view of the importance of the principles which are therein laid down the reader will be glad to have a full abstract of this Act. In this abstract only the formal wording is omitted.

James Hicks, of Great Wilbraham, clerk, by will, 3 June 1825, devised his manors, etc., subject to a life interest in favour of his wife Ann Hicks, to Edward Hicks, then Edward Simpson, jun., with various remainders, provided that within one year of attaining 21 he should take and use the surname of Hicks only, "and also should quarter the arms of Hicks as used by the said testator with his or their family arms,* and should within the space of one year apply for and endeavour to obtain an Act of Parliament or proper licence from the Crown,

* The family of Simpson was non-armigerous, and on 25 May 1836, during his minority and before the change of name, a grant of arms was made to Mr. Edward Simpson. The Rev. James Hicks, the testator, died 16 June 1823; Ann Hicks, his wife, died 27 July 1837.

or take such other means as might be requisite and proper to enable and authorize him or them respectively to take, use, or bear the said surname and arms of Hicks".

Edward (Simpson) Hicks attained 21 on 10 Aug. [1835]. Royal licence 20 August [1835] to said Edward Hicks "to take and use the surname of Hicks only, and also bear the arms of Hicks as used by the said James Hicks quarterly with those of Simpson, such arms being first duly exemplified according to the laws of arms and recorded in the Heralds' Office".

The Earl Marshal, by warrant, 22 Aug. [1835], directed Sir R. Bigland, Garter, and Sir W. Woods, Clarenceux, to grant and exemplify the arms of Hicks quarterly with those of Simpson accordingly.

Garter and Clarenceux on 4 Sept. last [1835] granted to said E. Simpson, jun. (then E. Hicks) the arms following:—

Quarterly: 1 and 4, gules on a fesse wavy or, between three fleur-de-lis erminois, an ermine spot for *Hicks*: 2 and 3, *Simpson*, and for the crest of *Hicks* a buck's head couped erminois gorged with a wreath of quatrefoils vert, and the crest of Simpson to be borne and used for ever thereafter by him the said Edward Hicks and his issue pursuant to the tenor of the said Royal Warrant and according to the law of arms.

The said grant was enrolled in the Heralds' Office on 4 Sept. [1835].

"And whereas a distinction was made by the College of Arms in the arms as aforesaid granted and assigned quarterly for Hicks, from the arms of Hicks as used by the said testator, on the ground that the said testator had not any legal authority to bear the said arms.

And that *according to the usage and custom** of the said College of Arms, the said arms of Hicks, so assumed by the said testator, *could not be granted* to the said Edward Hicks *without having some distinction made in them to difference them* from the arms of the persons *legally* entitled thereto.

"And whereas the said Edward Hicks ever since he attained the age of 21 hath used on all occasions the surname of Hicks only and hath quartered the arms of Hicks as used by the said testator with the family arms of him the said Edward Hicks . . but doubts may be entertained whether the said Edward Hicks will have *duly assumed* the surname and arms of Hicks as used by the said testator, quarterly with his, the said Edward Hicks', family arms unless an exemplification of the arms of Hicks, as used by the said testator, *without a distinction*, be granted to him by the said College, quarterly with his own family arms, or he be authorized by Parliament to take, use and bear the surname of Hicks and the arms of Hicks as used by the said testator, *without a distinction*, quarterly with his, the said Edward Hicks' own family arms. . . . Be it enacted [etc.]. . . . that the said Edward Hicks shall and may from and after the passing of this Act take upon himself and use in all deeds [etc.] . . . . the surname of Hicks only, and no other surname, and the same is hereby continued and confirmed to the said Edward Hicks.

"And further that the said Edward Hicks shall and may use and bear the arms of Hicks as used by the said testator, James Hicks, quarterly with the family arms of him the said Edward Hicks, and the same arms

* The italics, of course, are the present writer's.

are hereby established and confirmed to the said Edward Hicks.

"And be it further enacted that the arms of Hicks as used by said testator, without a distinction, quartered with the family arms of the said Edward Hicks, shall be duly exemplified to the said Edward Hicks by the said College of Arms ; anything in the laws or usage of the said College of Arms to the contrary in anywise notwithstanding."

This case of Hicks is a clear recognition by the legislature of the "usage and custom" of the College of Arms, and explicitly states that the arms belonging to one person cannot be granted to another. It is evident that this Act, which uses the expression "legally entitled thereto", recognizes that a coat-of-arms is an incorporeal hereditament vested in the grantee and those deriving under him.

It may be asked why the cumbrous process of an Act of Parliament, apart from the fact that the testator explicitly authorized such application being made, should have been resorted to when the later cases, of which *In re* Croxon is the latest exposition, shows that the condition of taking the testator's (bogus) arms being one impossible of fulfilment is therefore a condition in respect of which for non-compliance therewith the Courts will grant relief.

It must be remembered that in the Hicks case, as in similar cases, the legatee did not take the (bogus) arms of the testator (to which some other person was legally entitled), but a fresh coat granted *ad hoc* by the kings of arms. There was the risk that the Court might, if appealed to, have decided in favour of the view that the

condition of assuming the arms of Hicks "as used by the testator" had not been complied with, so that the property would have then passed over to the next entitled. It would have then been too late to apply for a relief Act, as Parliament would have refused to nullify a decision of the Court. There was not the same risk in obtaining an Act in order to dispose of a doubtful point.

It will be noticed that the Act directs Heralds' College to exemplify this Parliamentary coat to Mr. Hicks (anything in the laws or usage of the College to the contrary notwithstanding), but apparently nothing was done in the matter, and, as no provision was made for enforcing the direction, it remained a dead letter. It is evident, therefore, that Mr. Hicks, in addition to the arms of Simpson, became possessed of *two* coats-of-arms for Hicks, the differenced coat granted by the kings of arms, and the right to use a coat-of-arms precisely the same as that to which a distinct family of Hicks was legally entitled. To the descendants of Mr. Edward Hicks, Fox-Davis's *Armorial Families* ascribes the Parliamentary coat, while Burke's *Landed Gentry* acknowledges only the one recorded at Heralds' College. Presumably the former is in error in so doing, for as the Act of Parliament gave permission to Mr. Edward Hicks to use the undifferenced arms without mention of any of his descendants in remainder, it is quite clear that the parliamentary grant was purely personal and did not confer any right whatever on the representatives of Mr. Hicks. It is, therefore, plain that this statutory coat became extinct upon the death of that gentleman.

Three cases dealing with the subject of the assumption of arms may be usefully referred to here. They are as follows :—Austen *v.* Collins, *L.T.R.*, *54*, *p. 903* ; Joicey-Cecil *v.* Joicey-Cecil, *Times*, 12 June 1898, and *Genealogical Magazine*, July 1898 ; and *Re* Croxon, otherwise Croxton, *L. R. Ch.*, *p. 252*, 1904.

In *Austen* v. *Collins*, a name and arms clause contained a proviso that in case the devizee "should refuse or neglect within one year to take use and bear the surname and arms of Austen then immediately after the expiration of a year the devize should determine and become void." The legatee had assumed the name and had also used his best endeavours to comply with the directions as to the arms, but failed to obtain a grant from the Heralds' College of the right to use the identical arms used by the testatrix's husband. It was held by the learned judge, Mr. Justice Chitty, that the legatee had done all in his power to comply with the terms of the will, and that his interest in the devise was not affected by his failure to obtain a grant of the arms used by Mr. Austen. The reporter adds the note :—*Semble* ; a name and arms clause requires a taking of arms by a proper grant by a proper authority (viz., the College of Arms), and is not satisfied by a mere voluntary assumption of a coat-of-arms.

The modern case of Joicey-Cecil *v.* Joicey-Cecil, tried before Mr. Justice Kekewich in 1898, is of some importance in this connection. The testator, who was of a non-armigerous family, had used arms which by a blunder had been ascribed to the name of Joicey, though they were in fact the lawful arms of the obviously distinct

family of Ince. By a "name and arms" clause in his will he directed certain beneficiaries to "take the surname of Joicey, together with his or her family surname and quarter the arms of Joicey with his or her own family arms, and within one year apply to the Crown for a licence to use and bear the said surname and arms of Joicey." On the licence being issued, with the usual clause requiring the arms to be recorded and exemplified in Heralds' College, it was discovered that the testator's so-called arms were "bogus," being as already stated, the arms of Ince, and the Heralds' Office declined to exemplify them, but were willing to record a new grant in the name of Joicey. A "case" was therefore stated, and it was held by Mr. Justice Kekewich that the condition as to the assumption of arms was one which, under the circumstances, was incapable of being complied with, and accordingly a new grant of a Joicey quartering was made to the parties, though it is clear that after a judgment declaring the condition to be impossible of fulfilment there was no legal obligation upon them to obtain one.

The question, what is meant by the "lawful assumption of arms" has this present year been very fully discussed before Mr. Justice Kekewich in the case, *Re* Croxon, who held that this expression meant that a proper grant of arms must be obtained. The "headnote" of the case being sufficient for the purpose of this pamphlet follows, but the reader who desires to consider the arguments of the counsel engaged and the judgment of the learned judge, is referred to the full report, which, with various references to other cases, will be found in the Law Reports.

In *Re* Croxon. Croxon *v.* Ferrers.—In this case a person who had assumed the name and arms of Croxton, without any colour of right thereto, devised an estate to persons in succession, and directed that every person who should become entitled should bear "his" (the testator's) surname of Croxton, and "his" coat-of-arms, should within 12 months after so becoming entitled "lawfully assume" such name and arms, and that in default of compliance the estate should go over. The devizee first in succession, who was a son of the testator, took the name of Croxton, but did not within the time limited, assume the arms of Croxton, because it appeared that it was impossible for him, under the circumstances, to obtain a grant of the arms of Croxton from the College of Arms or by Royal Licence. it was held by Mr. Justice Kekewich, who cited the case, also decided by him, of Joicey-Cecil *v.* Joicey-Cecil, that the testator, using the words "lawfully assume," must have meant something more than a mere voluntary assumption ; that in order to comply with the condition it was necessary for the devisee to obtain a proper grant from the College of Arms or by Royal Licence ; and that as this could not be done, the condition was impossible, and, being a condition subsequent, was not binding on the devizee.—*L. R. Ch.*, i, 1904, p. 252.

It does not appear to have been suggested in any of the cases that the Court should hold that the condition would have been complied with by the parties assuming or using the testator's bogus arms, for obviously, as it was made clear in the case that the arms were the lawful property of another family, no Court would have sanctioned the commission of a trespass such as that would have been. It may be remarked incidentally that in

neither of the three cases was any suggestion made that either the common law or statutory rules of prescription are applicable to the use of coats-of-arms.

The question of the lawful use of arms has in Scotland long since been the subject of regulation by Parliament, for an Act dealing therewith was passed in 1592. This was subsequently superseded, and the use of armorial bearings in Scotland is governed by the Act of Parliament of 1672, c. 47, which directs :—

"All and sundry Prelates, Noblemen, Barons and Gentlemen, who make use of any armes or signes armorial within the space of one yeir aftir the said publication, to bring or send ane account of what armes or signes armoriall they are accustomed to use; and whether they be descendants of any familie the armes of which familie they bear, and of what Brother of the Familie they are descended . . . . to the effect that the Lyon King of Armes may distinguish the saids Armes with congruent differences, and matriculat the same in his Bookes and Registers, ... and it is statute and ordained with consent forsaid that the said Register shall be respected as the true and unrepeallable rule of all armes and bearings in Scotland to remain with the Lyons office as a publict Register of the Kingdome, and to be transmitted to his successors in all tyme comeing. And that whosoevir shall use any Armes any maner of way, after the expiring of yeir and day from the date of the proclamation to be issued hereupon in maner foresaid, shall pay one hundred pounds money toties quoties to the Lyon, and shall likewise

escheat to his Majestie all the moveable goods and geir upon which the saids armes are engraven or otherwise represented."

From this it will be seen that, according to the statute law of Scotland, no person in that country, or at any rate no one who possesses a Scottish domicile, is entitled to use arms, unless those arms are matriculated in the register of the Lord Lyon; it may even be questioned whether English people possessing lawful English arms should not matriculate them with Lyon, at any rate if they have acquired a Scottish domicile, before they make use of them north of the Tweed, though it is not likely that so strict a view of the statute would be taken by the Lyon office.

Those who wish to go more fully into the legal aspect of the question of lawful arms, will find references to other cases in the detailed reports of those just recited. The preceding notes of Acts of Parliament and cases are sufficient to show that only those arms are lawful which are borne in accordance with the law and practice of Heralds' College in England, and in Scotland after matriculation in the register of the Lord Lyon as provided by statute, and in Ireland after a grant or confirmation by Ulster King of Arms. In England there does not appear to be any positive enactment forbidding the use of bogus arms. It is clear, however, that such will not be recognised when their use is required to be proved for any legal purposes, and it may be regarded as certain that the use of another person's coat-of-arms is a trespass, even though it has

been described as a dispunishable trespass, and not improbably the use thereof by a stranger might be restrained by any person lawfully entitled to the arms wrongfully appropriated. In Scotland it is clear that there is a statutory penalty against the use of arms by any person not lawfully entitled thereto, while in Ireland it may be assumed that heraldic law there is analogous to that of England.

It is quite evident therefore from a consideration of the cases in England, and of statute law in England and in Scotland, that the only "lawful" arms are those that are borne in accordance with the laws of arms, as followed by the officers of arms in their respective countries. And the necessary corollary to this is that arms not recognised as "lawful" arms by the appointed authorities are necessarily "unlawful" and merely bogus, and stand on precisely the same footing as bogus titles.

Addendum.

As this third edition was going to press a further instalment of Mr. Baildon's article appeared in *The Ancestor* for July 1904, thus increasing to 79 pages the space already devoted by that magazine to this little pamphlet. Mr. Baildon's last 18 pages deal with the "most difficult point of the enquiry": When did the heralds cease to recognise prescriptive rights in armorial bearings?" And he has again collected a vast amount of interesting notes and extracts. Mr. Baildon has found a "difficulty" in this question, "so deftly evaded by 'X' and 'Mr. Phillimore'". And

naturally so, for a fallacy lies concealed in this apparently innocent enquiry, since the right answer to this question depends on the meaning of the term "prescription". By Mr. Baildon the term seems to be used in heraldry as it is in real property law, namely, the right of an occupant of land, on proving continuous undisturbed possession, to become the absolute owner. This right is the creation of statute. All the examples so diligently collected by Mr. Baildon merely prove the existence of a courtesy custom of "confirmation" by the kings of arms in cases where the user could adduce no record evidence of a grant. As might be expected, and as Mr. Baildon's extracts show, "confirmations" became gradually rarer, until it may be said, in England at least, that they have practically ceased to be issued. The more careful recording of grants at Heralds' College sufficiently accounts for this.

In 1568 it was ordered that no new grants of arms should be made without the assent of the Earl Marshal, but that the kings of arms might make grants of crests and issue confirmations, and this order is, perhaps, the basis of Dugdale's letter referred to on page 18 *ante*. Mr. Baildon refers to the present writer's statement "that the ultimate and only test is a grant or ancient allowance at some visitation" as an undue limiting of the powers of the heralds. Obviously it is, for if the officers of arms could confirm at visitations, they could do so in their own office at Bennets Hill. But the statement, though not literally accurate, broadly represents the real position, since the practice of issuing confirmations in England has of necessity long since become obsolete.

It may be noted that the modern advocates of pre-

scription fail to explain to us *when* a self-assumed coat-of-arms acquires that condition of lawfulness which will confer on the user thereof an exclusive right therein, "*contra omnes gentes*". It is important to know this, for unless, according to modern law, such a right can be acquired, all the pretensions of those who use "bogus" arms are wholly valueless.

"Prescription" and "confirmation" have distinct meanings, and there is no reason why they should be confused. "Prescription", a term of real property law, implies a *right*; "confirmation" is merely a *courtesy* allowance by the kings of arms of a doubtful claim to the use of armorial bearings.

July, 1904.